STATE OF MICHIGAN

COURT OF APPEALS

VICKY DYKES, Personal Representative of the Estate of JAMES DYKES, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee,

and

CHARLES MAIN, M.D.,

Defendant.

FOR PUBLICATION
June 19, 2001
9:00 a.m.

No. 214284
Oakland Circuit Court
LC No. 97-538719-NH

VICKY DYKES, Personal Representative of the Estate of JAMES DYKES, Deceased,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

No. 218386
Oakland Circuit Court
LC No. 97-538719-NH

Updated Copy
August 31, 2001

Before: Neff, P.J., and Talbot and J.B. Sullivan,* JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right an order of the circuit court dismissing her medical malpractice claim (Docket No. 214284) and appeals by delayed leave

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

granted an order awarding mediation sanctions against plaintiff (Docket No. 218386). We affirm the trial court' s grant of summary disposition and reverse the award of mediation sanctions.

I

Plaintiff filed this medical malpractice action against defendants[1] following the death of her sixteen-year-old son, James, who was treated in early 1992 at defendant William Beaumont Hospital (herein defendant) for a respiratory infection. James had been diagnosed with acute lymphocytic leukemia in 1978 and had an extensive medical history, including repeated chemotherapy treatment, a spleenectomy, and two bone marrow transplants.[2]

Following the second transplant in August 1991, James developed symptoms of a respiratory infection and was admitted to defendant on February 7, 1992. Defendant provided a course of diagnosis and treatment over the next two months, and James was subsequently discharged and readmitted to defendant twice during this time. Following readmission on March 26, 1992, James' diagnosis indicated the presence of pseudomonas bacteremia, but ruled out sepsis.[3] James was placed on medications for the pseudomonas. On March 31, 1992, defendant discharged James with instructions for follow-up blood cultures on April 6, 1992. James died on April 2, 1992, from pseudomonas septicemia.[4]

Plaintiff brought this medical malpractice action alleging that defendant was negligent in diagnosing James' problem as recurrent leukemia rather than a respiratory infection and in failing to provide a proper course of treatment. Specifically, plaintiff claimed that defendant violated the standard of care by failing to perform a bronchoscopy or an open lung biopsy to identify the source of James' respiratory problems and by failing to recognize that aggressive antibiotic therapy was warranted. In the affidavit of meritorious claim filed by plaintiff, plaintiff 's expert witness, Michael E. Trigg, M.D., stated that "had the standard of care been followed, James Dykes would [have] had a greater then [sic] 50% chance of surviving the infectious process from which he suffered . . . . "

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[1] Defendant Charles Main, M.D., was dismissed from the action by stipulation of the parties and is not involved in this appeal.

[2] The transplants were performed in Seattle, Washington. Upon release, James returned to defendant for aftercare treatment.

[3] Sepsis is defined as "the presence in the blood or other tissues of pathogenic microorganisms or their toxins." *Dorland's Illustrated Medical Dictionary* (29th ed), pp 1623-1624.

[4] Septicemia, also called blood poisoning, is defined as a "systemic disease associated with the presence and persistence of pathogenic microorganisms or their toxins in the blood." *Dorland's Illustrated Medical Dictionary*, (29th ed), p 1624. Plaintiff 's brief describes pseudomonas septicemia as a severe bacterial infection.

Following Dr. Trigg's deposition,[5] defendant moved for summary disposition on the basis that plaintiff failed to establish a genuine issue of material fact regarding the element of causation. Defendant argued that because Dr. Trigg testified that he could not state that the omitted treatments would have changed the outcome or prolonged James' life, plaintiff offered no evidence of causation beyond mere speculation and conjecture. The circuit court agreed and concluded that plaintiff had not met her burden of showing a genuine issue of material fact regarding whether it was more likely than not, but for defendant's conduct, James' injuries would not have occurred.

Following the dismissal, defendant moved for the taxation of costs against plaintiff as mediation sanctions under MCR 2.403(O)(1). The court granted the motion and awarded defendant $48,271.45.

II

In Docket No. 214284, plaintiff appeals the order of summary disposition. We affirm. This Court reviews de novo an order granting summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id*. A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties. *Id*. If the party opposing the motion presents evidentiary proofs creating a genuine issue of material fact, summary disposition is improper. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455, n 2; 597 NW2d 28 (1999); *Murad v Professional & Administrative Union Local 1979*, 239 Mich App 538, 541; 609 NW2d 588 (2000).

A

To prove medical malpractice, a plaintiff must show that the defendant's negligence proximately caused the plaintiff's injuries. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). Under Michigan law, proximate causation is subject to a more probable than not standard:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%. [MCL 600.2912a(2).]

Thus, to recover for the loss of an opportunity to survive or an opportunity to achieve a better result, a plaintiff must show that had the defendant not been negligent, there was a greater than

[5] During oral argument of this appeal, there was some question whether Dr. Trigg's deposition was taken for discovery purposes or de bene esse to preserve his testimony. The deposition transcript unequivocally reflects that it was a discovery deposition.

fifty percent chance of survival or of a better result. *Wickens v Oakwood Healthcare System*, 242 Mich App 385, 392; 619 NW2d 7 (2000), lv gtd 463 Mich 907 (2000); *Theisen v Knake*, 236 Mich App 249, 259; 599 NW2d 777 (1999).

Plaintiff's malpractice claim was premised on the theory that had defendant not been negligent, James more probably than not would have survived his infection, as Dr. Trigg stated in his affidavit:

> Within a reasonable medical probability had the standard of care been followed, James Dykes would [have] had a greater then [sic] 50% chance of surviving the infectious process from which he suffered; thus, the violation from [sic] the standard of care is a proximate cause of the damages claimed by Plaintiff.

In his deposition testimony, however, Dr. Trigg contradicted his affidavit. Defense counsel queried Dr. Trigg whether there was any way of knowing whether, "if [James] had received anti-pseudomonas medication during the February 12 hospitalization, [ ] he would have lived longer than April 2, 1992." Dr. Trigg responded that there was "no way of knowing that." Dr. Trigg also testified contrary to his affidavit with regard to defendant's failure to perform a bronchoscopy or an open lung biopsy:

> *Q.* [I]s it a fair statement to say that neither you nor I, as we sit here today, know what, if anything, a bronchoscopy would have revealed during [the February 7 to February 9, 1992 hospitalization]?
>
> *A.* That's a fair statement.
>
> *Q.* And is it also fair to say that because we don't know that, neither you nor I, or [sic] anyone can say within a reasonable degree of medical certainty that a bronchoscopy during that February 7 through 9, 1992 hospitalization would have made any difference in James Dykes' outcome and prolonged his life?
>
> *A.* That's a fair statement.
>
> * * *
>
> *Q.* [I]s it fair to say that as we sit here today, neither you nor I can conclude, or [sic] anyone else, what a bronchoscopy and or an open lung biopsy would have revealed during the February 12 hospitalization within a reasonable degree of medical certainty? Is that a fair statement?
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> *A.* My clinical judgement [sic] and assessment is it would have revealed a bacterial problem. I think that it would have been very useful, but I can't know that for certain.

We conclude that the trial court properly granted summary disposition because the deposition testimony of plaintiff's sole expert witness failed to establish the requisite causal link

between defendant's conduct and James' life expectancy or death. Dr. Trigg's deposition testimony directly contradicted his affidavit regarding the issue of causation. Defense counsel questioned Dr. Trigg regarding defendant's failure to diagnose pseudomonas and to recognize that antipseudomonas medication was indicated. Dr. Trigg conceded that there was "no way of knowing" whether James would have lived beyond April 2, 1992, if defendant had treated him with the recommended antibiotics. Nor could Dr. Trigg offer an opinion regarding James' life expectancy if the recommended treatment had been given. Dr. Trigg also acknowledged that it was not possible to state within a reasonable degree of medical certainty whether a bronchoscopy or an open lung biopsy would have made any difference in the outcome or prolonged James' life.[6] Viewing the evidence in the light most favorable to plaintiff, plaintiff failed to demonstrate a genuine issue of material fact regarding the element of causation. *Weymers, supra* at 647-648.[7]

Further, in light of Dr. Trigg's deposition testimony, plaintiff may not rely on Dr. Trigg's affidavit to establish the existence of a genuine issue of material fact. *Mitan v Neiman Marcus*, 240 Mich App 679, 682-683; 613 NW2d 415 (2000). Plaintiff argues that notwithstanding Dr. Trigg's deposition testimony, his affidavit states that if defendant had followed the standard of care, James would have had a greater than fifty percent chance of surviving his infection. Plaintiff maintains that this conflicting testimony presents a question of fact for the jury. We disagree that Dr. Trigg's affidavit creates a question of fact sufficient to defeat summary disposition.

This Court has held that "'parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given damaging testimony in a deposition.'" *Mitan, supra* at 683, quoting *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993), citing *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 233-234; 477 NW2d 146 (1991). In *Barlow v John Crane-Houdaille, Inc*, 191 Mich App 244; 477 NW2d 133 (1991), the trial court granted the defendant's motion for summary disposition notwithstanding inconsistencies between the plaintiff 's deposition testimony and his subsequently filed affidavit. The *Barlow* Court relied on the earlier holding in *Gamet v Jenks*, 38 Mich App 719; 197 NW2d 160 (1972), and restated this principle and its underlying rationale:

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[6] Our dissenting colleague characterizes defense counsel's questions as eliciting a response in terms of absolute certainties, "i.e., a one-hundred percent probability," *post* at ___, and interprets Dr. Trigg's responses as "a reluctance to state his conclusions in terms of absolute certainties," *post* at ___. We note that defense counsel's questions did not seek answers from Dr. Trigg in terms of *absolute* certainty. Rather, he was asked if he could state *within a reasonable degree of medical certainty* whether defendant's failure to properly diagnose and treat James affected the outcome or James' life expectancy. Dr. Trigg was unable to do so.

[7] In her response to defendant's motion for summary disposition, plaintiff relied on Dr. Trigg's testimony that, in his opinion, James' infectious process was more likely than not bacterial in nature. This question of probabilities is not the relevant inquiry. In order to show a genuine issue of material fact regarding causation, plaintiff must offer evidence that it is more likely than not that but for defendant's conduct, a different result would have obtained. *Weymers, supra* at 647-648.

> "As a result of his own deposition testimony, plaintiff's ability to present a case was challenged. His affidavit merely restated his pleadings. Deposition testimony damaging to a party's case will not always result in summary judgment. However, when a party makes statements of fact in a 'clear, intelligent, unequivocal' manner, they should be considered as conclusively binding against him in the absence of any explanation or modification, or of a showing of mistake or improvidence. The purpose of GCR 1963, 117 [now part of MCR 2.116] is to allow the trial judge to determine whether a factual issue exists. This purpose is not well served by allowing parties to create factual issues by merely asserting the contrary in an affidavit after giving damaging testimony in a deposition. As was stated in *Perma Research and Development Co v The Singer Co*, (CA 2, 1969), 410 F2d 572, 578:
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> > "'If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" [*Barlow*, *supra* at 250, quoting *Gamet*, *supra* at 726 (citations omitted).]

See also *Downer, supra* at 233-234; *Peterfish v Frantz*, 168 Mich App 43, 54-55; 424 NW2d 25 (1988); *Stefan v White*, 76 Mich App 654, 660; 257 NW2d 206 (1977). In *Kaufman & Payton, PC, supra* at 257, this Court again rejected a party's attempt to contrive factual issues "by relying on an affidavit when unfavorable deposition testimony shows that the assertion in the affidavit is unfounded." This Court suggested that this principle "is not limited to *parties* who make contradictory assertions. The principle that contradictory affidavits should be disregarded stands irrespective of the identity of the maker of the conflicting statements." *Id.*

The cited cases involved the filing of an affidavit after damaging deposition testimony had been given, whereas in the instant case, the affidavit of merit was filed with plaintiff's complaint before deposition testimony was taken. We believe that this is not a meaningful distinction and the same rationale applies. Dr. Trigg's affidavit of meritorious claim restated the pleadings and generally articulated the threshold of proof that defendant's breach of the standard of care was a proximate cause of plaintiff's damages. In contrast, at deposition, Dr. Trigg was subjected to cross-examination and responded to specific questions regarding defendant's failure to administer antibiotic treatment and to perform a bronchoscopy or lung biopsy. As the *Barlow* Court recognized, the utility of summary disposition would be diminished if a party could defeat summary disposition by filing an affidavit after testifying unfavorably at deposition. *Barlow*, *supra* at 250; *Gamet*, *supra* at 726. Indeed, in medical malpractice cases, a plaintiff is required to file an affidavit of meritorious claim by a health professional at the commencement of the action. MCL 600.2912d. In such cases, summary disposition would rarely, if ever, be warranted even if effective cross-examination of that person at deposition negates an element of the plaintiff's prima facie case.

Accordingly, we affirm the trial court's grant of summary disposition because plaintiff failed to show the existence of a genuine issue of material fact with regard to the question of causation.

III

In Docket No. 218386, plaintiff appeals the award of costs under MCR 2.403(O)(1). Plaintiff contends that the court erred in awarding costs on the basis of her limited acceptance of the mediation award, MCR 2.403(L)(3). We agree.

A

The interpretation and application of court rules presents a question of law that is reviewed de novo. *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999); *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). MCR 2.403(L)(3)(c) provides:

> If a party makes a limited acceptance under subrule (L)(3)(b) and some of the opposing parties accept and others reject, for the purposes of the cost provisions of subrule (O) the party who made the limited acceptance is deemed to have rejected as to those opposing parties who accept.

In this case, the mediation evaluation awarded zero against Dr. Main and $75,000 against defendant. Plaintiff accepted the mediation evaluation as a limited acceptance under MCR 2.403(L)(3)(b)(i), conditioned on the acceptance of both Dr. Main and defendant. Dr. Main accepted the mediation evaluation, and defendant rejected it. We conclude that plaintiff 's limited acceptance of the award does not constitute a rejection with respect to defendant because defendant did not accept the mediation evaluation.

The Supreme Court previously reversed a decision of this Court that affirmed mediation sanctions with regard to a limited acceptance, stating:

> Under MCR 2.403(L)(3)(c), for the purposes of the costs provision of subrule (O), National Precast's limited acceptance is not deemed a rejection with regard to plaintiffs because plaintiffs did not accept the mediation panel's evaluation. [*Baldasan v Nat'l Precast, Inc*, 451 Mich 894; 550 NW2d 525 (1996).]

An order that is a final Supreme Court disposition of an application and that contains a concise statement of the applicable facts and reasons for the decision is binding precedent. See *People v Crall*, 444 Mich 463, 464, n 8; 510 NW2d 182 (1993). We find the order in *Baldasan* precedent for our decision.

Even without the guidance of this precedent, we reach the same conclusion given the language and purpose of MCR 2.403. This Court should construe a court rule in accordance with the ordinary and approved usage of its language in light of the purpose the rule seeks to

accomplish. *Bush v Mobil Oil Corp*, 223 Mich App 222, 226; 565 NW2d 921 (1997). The Court should avoid construing a court rule in a manner that results in a part of the rule becoming nugatory or surplusage. *Grzesick, supra* at 560.

MCR 2.403(L)(3)(c) specifies that "the party who made the limited acceptance is deemed to have rejected as to those opposing parties *who accept*" (emphasis added). This part of the court rule would be rendered nugatory, contrary to the rules of construction, if the limited acceptance party was also deemed a rejecting party with respect to opposing parties *who reject.* Further, the purpose of the mediation sanction rule "is to encourage settlement and deter protracted litigation by placing the burden of litigation costs upon the party that required that the case proceed toward trial by rejecting the mediator's evaluation." *Broadway Coney Island, Inc v Commercial Union Ins Cos (Amended Opinion)*, 217 Mich App 109, 114; 550 NW2d 838 (1996). In this case, had defendant accepted the mediation evaluation, the litigation would have concluded, given plaintiff 's prior limited acceptance. Thus, we conclude that under the language of MCR 2.403(L)(3)(c), a party who makes a limited acceptance of an award is deemed to have rejected it only with respect to those opposing parties who accepted, but not with respect to those who rejected, the award.

Accordingly, because plaintiff 's conditional acceptance was not a rejection with respect to defendant, defendant was not entitled to mediation sanctions under MCR 2.403(O)(1). Therefore, the trial court erred in awarding defendant mediation sanctions.

B

In light of our determination that the circuit court erred in awarding mediation sanctions, we need not address plaintiff 's remaining claims concerning the amount awarded and the form of the order.

Affirmed in part and reversed in part.

/s/ Michael J. Talbot
/s/ Joseph B. Sullivan